United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

336

IN THE UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22,424

EDWARD C. BURKE,

Appellant

vs

UNITED STATES OF AMERICA,

Appellee

BRIEF FOR APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

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CASES CITED

STATUTES INVOLVED

STATE OF QUESTIONS PRESENTED

1. Whether the appellant was proven to be guilty of petit larceny beyond a reasonable doubt.

2. Whether the evidence of the case was insufficient to support all the elements of petit larceny by wrongfully withholding property of a known owner with the specific intent to permanently deprive the true owner of her property.

3. Whether the evidence was sufficient to exclude all reasonable doubt of mistake, misunderstanding or innocent taking and possession by the appellant in view of all the circumstances of the case, including the element of time involved therein.

This case has not previously been before this Court, either under the same or similar title.

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1291, to review in forma pauperis the conviction and sentance imposed upon appellant in the United States District Court for the District of Columbia, which judgement of conviction and sentance was a final decision in the said District Court. It is from this final decision that this appeal is taken.

STATEMENT OF THE CASE

Appellant was brought to trial on June 4, 1968 on an indictme of the Grand Jury of the District of Columbia charging that on or ab December 1, 1967, within the District of Columbia, appellant by for and violence and by sudden and stealthy seizure and snatching, st took from the person and from the immediate actual possession of Mildred E. Heitmuller, property of Mildred E. Heitmuller of the of about $97.00, consisting of a billfold of the value of about $10.00 about $87.00 in money. The defendant pleaded not guilty to this cha and a jury was impaneled and the case was tried on this issue. Up the conclusion of evidence the Court instructed the jury on the el of the charge of robbery as alleged aforesaid and also instructed the jury as to the lesser included offense of petit larceny. After deliberation in the case the jury found the defendant not guilty of the charge of robbery but returned a verdict of guilty as to the charge of petit larceny. Up this verdict of the jury the Court entered a judgment of conviction 23rd day of August, 1968, and sentenced the defendant to the custod the Attorney General or his authorized representative for imprison for a period of one year.

The defendant then noted his appeal which is now before Court.

The evidence of record shows that on or about December 1 at about 5:00 o'clock P.M., the complaining witness, Mildren F Heitmuller entered a Safeway Store at or near 14th Street, N.W. a

Park Road, Washington, D. C. She was carrying a purse with the st- over her left arm, and while in the store had picked up several items which she carried in her hand. She went to the rear of the store wh- the meat counter was located and reached above this counter to pic- package of chip beef. While so reaching she apparently felt what s- described to be a tug on her left arm and after having taken the ch- from the shelf, she looked down and noticed that her purse was her billfold was missing (Transcript, June 4, Pages 3, 4, 22, 25, The defendant had also entered the store by the side doorway at or the same time that Mrs. Heitmuller was in the store and had gone toward the meat counter to look for some cold cuts. On the way th- he stepped on an object, looked down and saw a wallet, and picked it u- from the floor (Transcript, June 5, Pages 19-21, 36). While he was standing there with the wallet in his left hand trying to decide what he would do with it, or whether he should turn it over to the manager Mrs. Heitmuller turned towards the defendant who was at said tim- standing about an arms length away from her, at which time she ac- the defendant of taking her billfold and she appeared very upset a- distraught. The defendant denied taking the billfold from Mrs. Heitmul- and while he was attempting to talk to her, a Mr. Boone, an emplo- the Safeway Store, approached the defendant from the rear and - under his coat and took the billfold from the defendant. At no tim- the defandant given reasonable opportunity to verify the owner-

billfold and to explain how he had come into its possession as well as having a reasonable opportunity, after determining the true owner, to return same. (Transcript of June 4, Page 25-27, 30, 66, Transcript June 5, Pages 21, 41, 42, 50) At or about this same time, Mrs. Heitmuller who was very upset, began calling for help (Transcript of June 4, Page 30). Mr. Boone indicated that he first noticed the standing immediately to the left of Mrs. Heitmuller while she was reaching for the chip beef. The defendant also appeared to be looking at the meats on the meat counter. Boone indicated that he saw some kind of movement underneath defandant's trenchcoat and described a motion of moving ones right hand over to the left rear pocket underneath this coat. At this time the appellant was still standing in the position of selecting or examining the meat on the meat counter. (Transcript of June 4, Page 1, Page 63, 64, 65, 73, and 74) Boone walked over toward appellant and Mrs. Heitmuller but he did not say anything either to Mrs. Heitmuller or appellant but immediately raised appellants coat and took the billfold from appellant's left rear pocket although the evidence indicates that appellant may have been holding billfold behind his back until Mrs. Heitmuller had given some indication of identification of the said billfold (Transcript of June 4, Page 50, Transcript of June 5, Pages 45, 46, 48). Appellant Burke did not resist Mr. Boone in any manner at the time that he searched him and took billfold from his pocket however, but apparently willingly went

rear of the store with the understanding that they would discuss the matter and get it straightened out. Upon reaching the rear of the sto guards were posted at the door and no conversation was entered with Burke, as the result of which he became frightened and tried to ge away (Transcript of June 4, Page 76, Page 77, Transcript of June 5 Page 27, Page 28). Everything occurred fast and within a period of about five seconds to two minutes from the time the appellant on found the wallet lying on the floor until he was searched and escorte the rear of the store.

STATEMENT OF POINTS ON APPEAL

The Court below erred as a matter of law and fact in enter judgment of conviction and sentencing the defendant to prison for the following reasons:

1. The evidence of record is insufficient as a matter of law and fact to support the jury's verdict and the judgment of conviction sentence of the Court below.

2. The evidence of record is insufficient as a matter of law and fact to establish an unlawful taking of the alleged property, actual knowledge that Mrs. Heitmuller was the true owner of the property sufficient time for the determination of this fact, reasonable and time for the identification of the owner and the return of the prope her, the formation of the specific intent to steal, that is to perman deprive her of her property, and the necessary taking and carry away of the property as required for the offense of petit larceny.

The appellant requests that the Court read the following parts of the Transcript in connection with the above points:

(a) Transcript of June 4, 1968, Lines 5-7, p. 22; Lines 7-[illegible] p. 23; Lines 9-12, 21-22, p. 24; Lines 5-20, p. 25; Lines 10-23, p [illegible] Lines 1-2, 12-13, p. 27; Lines 10-15, p. 28; Lines 20-24, p. 29; Li[illegible] 1-7, p. 30; Lines 2-10, p. 32; Lines 5-10, p. 33; Lines 3-10, p. 35; Lines 12-19, p. 50; Lines 2-4, p. 59; Lines 6-17, p. 60; Lines 10-[illegible] p. 61; Lines 308, p. 62; Lines 20-24, p. 63; Lines 1-4, p. 64; Lines 23-24, p. 64; Lines 1-2, 13-22, p. 65; Lines 5-15, p. 66; Lines 14-[illegible] p. 72; Lines 1-3, 19-23, p. 73; Lines 1-8, p. 74; Lines 21-23, p. 76; Lines 1-23, p. 77; Lines 1-4, p. 78;

(b) Transcript of June 5, 1968, Lines 17-20, p. 18; Lines [illegible] 3-21, p. 19; Lines 1-4, 13-21, p. 20; Lines 1-21, p. 21; Lines [illegible] p. 22; Lines 9-20, p. 25; Lines 2-11, p. 26; Lines 4-16, p. 27; Lines [illegible] 12-21, p. 28; Lines 1-7, p. 29; Lines 7-21, p. 36; Lines 1-2, 13-21 p. 37; Lines 1, p. 38 to Line 5, p. 40; Lines 18-21, p. 40; Lines 13-[illegible] p. 41; Lines 1-2, 8-14, p. 42; Lines 12-20, p. 43; Lines 9-21, p. 45; Lines 1-18, p. 46; Lines 13-21, p. 48; Lines 1-5, 19-21, p. 49; Lines [illegible] 1-11, p. 50; Lines 1-10, p. 127; and

(c) Transcript of June 6, 1968, Lines 12-22, p. 11; and Lines 8-13, p. 14.

SUMMARY OF ARGUMENT

The jury by its verdict of not guilty of robbery has adopted in substance appellants testimony as to the manner of his possession complaining witness's billfold and has rejected the Government's con tion that he took same from the purse of the complaining witness. Since the billfold came into the possession of appellant in some lawful man the Government must prove beyond reasonable doubt each and every element of larceny by willfully withholding property from the true o[illegible] known at the time to the appellant, with intent to steal same.

The Government has failed in nearly every respect and

solely upon bare suspicion arising from its discredited theory that appellant stole the billfold by stealth, thereby amounting to robbery. Almost every essential element of this case is premised on the fact that defendant temporarily withheld immediate delivery to complaining wit- although under the circumstances he denied taking the property from he- and was still determining what course to take when the billfold was snatched from him. There was no proof of specific interest to steal or permanently withhold the property or sufficient evidence of asportatio-

ARGUMENT

I.

Upon the trial of appellant on the charge of robbery, the appe-- was acquitted by the jury. Such finding of not guilty requires that the evidence presented by the Government to establish a wrongful taking from the person or immediate possession of Mrs. Heitmuller by stealth be rejected. The Appellate Court is required to construe the evidence mos- favorably for the appellant regarding the issues upon which he was acquitted.

Therefore, it is concluded that the jury rejected the Governm-- contention of an initial wrongful taking and the only legitimate evidenc- remaining was appellant's undisputed testimony that he stepped on a bil-- fold and picked it up. Furthermore, no substantial evidence has been shown to rebut appellant's testimony that he was still undecided as to w- action he should take when suddenly accused of stealing the billfold, c

which incident the billfold was taken from him.

All of the evidence against the appellant is circumstantial in nature. It has been repeatedly held that where the guilt of an accused is based wholly upon circumstantial evidence, such evidence must not only establish every essential element of proof beyond reasonable doubt but must also exclude every reasonable hypothesis of innocence.

Suspicion, however strong, will not support a conviction and proof by circumstantial evidence cannot support a conviction unless the only possible inference to be derived from it is guilt and must foreclose and make impossible any other conclusion. Md. and Va. Milk Producers Ass'n v U.S., 90 US App DC 14, 23, 193 F. 2d 907; Jackson v D.C., 180 A. 2d 885.

The case of Hunt v. U.S., 316 F. 2d, 652, 115 US App DC 1, relied upon by appellant below, and also cited by the Court below is in support of submission of the case to the jury, is not sufficiently relative in fact to support or finding of guilt of petit larceny in the present case. The Appellate Court there rightfully held that the circumstances of complainant finding her wallet missing upon boarding the bus was insufficient in law and fact to support the charge of robbery or to support the conclusion of a wrongful taking. There the similarity between the cases ended. In Hunt, one accused was heard to say "Here comes that woman" or similar words, which supported an inference that the accused knew she was the rightful owner and when coupled with the immediate fl

and the attempt to throw the wallet into the gutter, the Court co[illegible] there was sufficient circumstantial evidence to submit to the jury. At best, that case barely established evidence of a willful withholding, [illegible] knowledge of identity of ownership, the intent to steal (primarily sup- by immediate flight and the attempt to throw away the wallet), and the required asportation (running away with the wallet). Unlike Hunt, wh[illegible] appellant was accused of stealing wallet, not merely having possession o it, he denied it. He remained there confident that the matter could explained and he would have opportunity to do so. The billfold was immediately taken off his person before any discussion or explanatio[illegible] was allowed. There was no asportation on the part of the appellant. The evidence clearly established that he was still at the same place wh[illegible] found the billfold when same was taken by witness Boone.

The evidence against appellant viewed in the strangers light against him supports no more than a base suspicion of guilt, but also supports a more reasonable conclusion that all parties involved th[illegible] were excited, confused and mistaken in the conclusions they readily jumped to in suspecting the appellant.

The essential elements of larceny by withholding propert[illegible] the known owner is not supported by statutory authority and therefo[illegible] must be concluded to be based upon statuting law of larceny which m[illegible] be strictly construed in favor of the appellant (Section 22-2202, D[illegible] of Columbia Code, 1961, as amended).

Two of the essential elements of larceny under common law was proof a specific intent to steal, that is to permanently deprive the owner of his property, and taking and carrying away of the property (that is asportation), both of which must have been established beyond reasonable doubt. Asportation must be proven and not presumed. McRae v U.S. (D.C. App.) 222 A. 2d 848; Groomes v U.S. (D.C. App.) 155 A 2d 73.

The mere possession of the property by appellant raised no inference of guilt as the jury rejected the theory of an unlawful taking from the person or possession of the owner, thereby eliminating the inference that recent possession of stolen goods would support an inference of guilt. While the jury verdict has rejected this, the prosecutions case is almost wholly based upon the inference of possession by appellant alone being tantamount to prove the required constructive taking, the intent to steal, the willful withholding of the property from a known true owner, the influence that sufficient time had passed to amount to legal and reasonable opportunity to determine true ownership and return the property and the asportation of the property. It is highly doubtful if these conclusions could be supported by recent possession of property actually stolen from the person of an owner. Here you have inferences pyramided upon inferences, layer after layer, to support the ultimate conclusion of guilt. To use an inference, drawn from one piece of evidence, as the cornerstone upon which to draw another inference of guilt, which in turn is used to infer some other guilty intent or motive stretches the rules of evidence beyond legal elasticity and should be

rejected, particularly where the time to consider a course of action amounted to from five seconds to two minutes.

At best this case shows that the appellant, moments before being accused of taking the billfold, had found it on the floor and, while remaining at the same point where he found it, was trying to decide what to do with it when accused by Mrs. Heitmuller of taking it and when approached by Mr. Boone who removed the billfold from his possession. The circumstances were confused, the parties excited. There was no ample opportunity, upon which criminal inferences, specific intent to steal or other necessary elements of the offense, for appellant to clear up the matter or otherwise explain the occurrence. Therefore, the Court should conclude that the circumstantial evidence is unsufficient as a matter of law and fact.

CONCLUSION

It is respectfully concluded that the verdict of the jury, the judgment of conviction, and the sentence of the Court below is not sufficiently supported by fact or law and this Court ought to reverse the judgment of the Court below and order the discharge of appellant of the charges, or grant such other relief as will effect a dismissal of the charge of petit larceny.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Two copies of said Brief of Appellant have been duly served upon the United States Attorney for The District of Columbia by delivering copies of same to his offices at the U.S. Courthouse, 3rd Street and Constitution Avenue, N.W., Washington, D. C. on the day of February, 1969.

Roland D. Hartshorn